No. 46919-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Akeem Henderson,

Appellant.

Pierce County Superior Court Cause No. 14-1-00930-7

The Honorable Judge Stephanie Arend

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Instead of inquiring into Mr. Henderson's request for new counsel, the trial court allowed him to proceed *pro se* and appointed the same attorney as standby counsel.

After being charged with five felonies and several misdemeanors,[1] Akeem Henderson wrote to the court to inform the judge that his relationship with his public defender had completely broken down. CP 1-2. He told the judge that his attorney had walked out on their last meeting at the jail and never come back. CP 2-3. He also said that counsel had failed to talk to any of Mr. Henderson's proposed witnesses. CP 2.

Mr. Henderson asked the judge to appoint him new counsel. CP 2.

The court never addressed Mr. Henderson's concerns.

At the next hearing, Mr. Henderson asked to represent himself. RP (10/6/14) 2. He said that he made the decision because his attorney "told him things that weren't true" and was not representing him adequately. RP (10/6/14) 8-9, 11, 15. The court granted Mr. Henderson's request to go *pro se*. RP (10/6/14) 15.

[1] The charges included three counts of felony harassment, third degree escape, two counts of obstructing a law enforcement officer, third degree assault, unlawful possession of a firearm, three counts of simple drug possession, and driving while license suspended (DWLS) in the third degree. CP 17-23. The jury eventually acquitted him of assault and one harassment charge. RP (11/6/14) 506.

The court appointed Mr. Henderson's original counsel as his standby counsel. CP 9. Again, Mr. Henderson wrote to the judge, telling him that he had had a serious breakdown in communication with that attorney. CP 9. He said that he was completely unable to reach the lawyer. CP 9. Once more, the court did not address Mr. Henderson's concerns.

On the first day of trial, Mr. Henderson told the (new) judge that he had been forced to go *pro se* because of his conflict with his attorney. RP (11/3/14) 14-15. The court declined to revisit the prior judge's ruling permitting Mr. Henderson to represent himself. RP (11/3/14) 15.

The trial moved forward, with Mr. Henderson representing himself.

2. At trial, the state was required to prove that Mr. Henderson threatened Joshua Boyd "while in a patrol car," and that he placed Boyd in reasonable fear that the threat would be carried out.

Mr. Henderson's charges included three counts of felony harassment, stemming from an encounter with police who came to serve an arrest warrant. CP 17-19. In Count II, the Information alleged that Mr. Henderson threatened to harm "a person, to wit: Joshua Boyd, while the defendant was in a patrol car, and by words or conduct placed[d] the

person threatened in reasonable fear that the threat would be carried out." CP 18.

The court's "to convict" instruction for Count II required proof that "while in a patrol car, the defendant knowingly threatened to cause bodily injury to Joshua Boyd," and that he "placed Joshua Boyd in reasonable fear that the threat would be carried out". CP 34.

At trial, Officer Joshua Boyd testified to statements Mr. Henderson allegedly made while in his patrol car following arrest. RP (11/4/14) 225-230. Boyd said that Mr. Henderson told him he'd been holding a gun when officers came to his door. RP (11/4/14) 228. According to Boyd, Mr. Henderson said that he should have blasted the officers and that he was going to do so the next time police officers came to his door. RP (11/4/14) 229. Boyd did not testify to any other "threats" made while Mr. Henderson was in his car. RP (11/4/14) 219-296.

3. Testimony showed that officers found one gun and two kinds of prescription medication in the apartment where they'd arrested Mr. Henderson; they did not notice the 1/10th gram of heroin residue later discovered by a forensic scientist.

After Mr. Henderson spoke of having a gun, Boyd applied for a warrant to search the residence where the arrest had been made. RP (11/4/14) 236. Police returned to the apartment, and found three other people in the home during the search. RP (11/4/14) 237.

While searching, officers found some mail with Mr. Henderson's name but a different address. RP (11/3/14) 62; RP (11/4/14) 248. In one bedroom, they found an employee ID badge with Mr. Henderson's name on it. RP (11/4/14) 243. In the same bedroom, the officers found a driver's license naming someone other than Mr. Henderson. RP (11/4/14) 242-244.

In the closet, the officers found a jacket with a plastic bag in the pocket. RP (11/4/14) 248-249. Inside the bag, officers saw what appeared to be prescription drugs. RP (11/4/14) 249. They found a gun under the mattress in the bedroom to which the closet was attached.[2] RP (11/4/14) 244-246.

The officers sent the bag with the prescription drugs to the crime lab. RP (11/5/14) 308. A forensic scientist tested them and found that two of the four types of pills were controlled substances. RP (11/5/14) 316-318.

The scientist also discerned a small amount of residue on the inside of the plastic bag. RP (11/5/14) 209. The officers who seized the bag had not noticed the residue. *See* RP (11/4/14) 248-249; Ex. 8. The scientist tested the residue, which turned out to be heroin. RP (11/5/14) 319-321.

[2] The gun matched the one described by Mr. Henderson at the time of his arrest. *See* RP (11/4/14) 228.

She was unable to weigh the residue because the amount was so small. RP (11/5/14) 225. She said that it weighed less than one tenth of a gram. RP (11/5/14) 225.

4. In closing arguments, the prosecutor argued that Mr. Henderson's alleged control over the premises proved constructive possession.

In closing, the prosecutor argued that there was sufficient evidence that Mr. Henderson had constructively possessed the drugs and gun because he'd had control over the premises. RP (11/6/14) 467.

The prosecutor said that "the defendant had been in the apartment on March 12, in the structure where the gun was, where the drugs were. He was in constructive possession on that day as well…" RP (11/6/14) 467.

He later argued that the state had proved that Mr. Henderson constructively possessed the drugs because "They were in his room. The defendant resided there. He had mail there. He had documents there. He had his ID badge there. His gun was there, all in that room that he had dominion and control over." RP (11/6/14) 168.

5. Even after the court sustained Mr. Henderson's objections, the prosecutor continued to argue that the defendant should have called witnesses to testify.

In his closing, Mr. Henderson argued that the state had failed to prove its case because it had not called all of the officers at the scene or all of the occupants of the residence as witnesses. RP (11/ 6/14) 484-485, 487. In response, the prosecutor argued that Mr. Henderson should have called those people as witnesses. RP (4/6/11) 496-497.

Mr. Henderson objected to the prosecutor's burden shifting, and the court sustained the objection. RP (4/6/11) 496. The judge did not strike the prosecutor's statements or tell the jury to disregard them. RP (4/6/11) 496.

The prosecutor's next statement was that Mr. Henderson could have called his girlfriend as a witness. RP (4/6/11) 496. Mr. Henderson's objection was sustained again. RP (4/6/11) 496-497. The judge again failed to strike the arguments or to admonish the jury not to consider them. RP (4/6/11) 497.

The prosecutor also told the jury that they were convinced of Mr. Henderson's guilt beyond a reasonable doubt "if you believe in your heart of hearts that, yes, these elements have been proven." RP (11/6/14) 490.

6. Based on the jury's finding that he possessed a single handgun and three different controlled substances, Mr. Henderson received sentences for unlawful possession of a firearm and three firearm enhancements, one for each kind of drug possessed.

The jury found Mr. Henderson guilty of three counts of drug possession, one for each different substance. The jury also found that he was armed with a firearm during each possession charge. Jurors also convicted him of unlawful possession of a firearm.[3] RP (4/6/14) 506-507.

The court found the three drug possession charges comprised the same criminal conduct. RP (11/14/14) 16. In addition to sentencing Mr. Henderson on the underlying charges, the court imposed three consecutive firearm enhancements, totaling fifty-four months. CP 107.

At sentencing, the court did not ask about Mr. Henderson's financial situation. RP (11/14/14) 3-20. The judge found him indigent for purposes of appeal. CP 123-25. Still, the court ordered him to pay $1,400 in legal financial obligations (LFOs). CP 105.

This timely appeal follows. CP 122.

[3] In addition, he was convicted of all of the misdemeanor charges and two counts of felony harassment. The jury acquitted him of assault and one count of harassment. RP (11/6/14) 506.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HENDERSON OF FELONY HARASSMENT IN COUNT II BECAUSE HE NEVER ACTUALLY THREATENED TO HARM BOYD.

A. The state didn't prove that the unnamed, yet-to-be-determined officers had a reasonable fear that Mr. Henderson would carry out any threats.

Count II charged Mr. Henderson with harassment for allegedly threatening Boyd while in his patrol car. CP 18. But Mr. Henderson never specifically threatened Boyd. Instead, he made a nebulous threat to any police officers who came to his door in the future. RP (11/4/14) 229.

According to Boyd, Mr. Henderson said that he should have shot Boyd and the other officers when they came to his door. RP (11/4/14) 229. He also said that he was going to "blast" any officers who showed up at his house in the future. RP (11/4/14) 229.[4]

There was no evidence that the un-named, yet-to-be-determined future officers were aware of Mr. Henderson's statement or were placed in reasonable fear as a result. Accordingly, there was insufficient evidence to convict Mr. Henderson of count II.

[4] Although the same group of officers (including Boyd) did appear at the house again a few days later, neither Boyd nor Mr. Henderson knew that would happen at the time: Boyd said that he did not apply for the warrant to search the home until after the alleged threats in the patrol car were finished. RP (11/4/14) 235-236.

A person can commit harassment by threatening someone other than the person to whom the threat is communicated. RCW 9A.46.020(1). But harassment has not taken place unless the person threatened actually knows about the threat and is placed in reasonable fear that it will be carried out. *State v. Kiehl*, 128 Wn. App. 88, 93, 113 P.3d 528 (2005); *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001).

In *Kiehl*, for example, evidence was insufficient to prove harassment when the accused told his mental health counselor that he planned to kill a judge but there was no evidence that the judge knew about the threat or was placed in reasonable fear. *Kiehl*, 128 Wn. App. at 93.

Similarly, here, there was no evidence that the unnamed, yet-to-be-determined officers heard of or were placed in fear by Mr. Henderson's statements. Even taking the evidence in the light most favorable to the state, there was insufficient evidence to convict Mr. Henderson of count II. *State v. Fansworth*, 184 Wn. App. 305, --- P.3d --- (2014), *amended on denial of reconsideration* (Jan. 13, 2015).

B. The state didn't prove that Mr. Henderson specifically threatened Boyd while in the patrol car, as required under the law of the case.

There was also insufficient evidence to convict Mr. Henderson under the law of the case. *State v. France*, 180 Wn.2d 809, 814, 329 P.3d

864 (2014). Un-objected-to jury instructions become the law of the case. *Id.* If the jury is instructed that it must find some non-statutory element to convict the accused, then the state must prove that additional element beyond a reasonable doubt. *Id.*

Here, the to-convict instruction for count II required the jury to find that "while in the patrol car, the defendant knowingly threatened to cause bodily injury to Joshua Boyd." CP 34.[5] Under the law of the case, the state was required to prove beyond a reasonable doubt that Mr. Henderson threatened to harm Boyd, specifically, and that the threat was made in the patrol car. *Id.*

As outlined above, Mr. Henderson never threatened to harm Boyd. Rather, he said that he wanted to harm indeterminate officers who came to his home at some indefinite time in the future. RP (11/4/14) 229. The state presented insufficient evidence to prove that Mr. Henderson threatened Boyd, as required by the law of the case. *France*, 180 Wn.2d at 814.

Even taking the evidence in the light most favorable to the state, no rational trier of fact could have found either that Mr. Henderson threatened Boyd or that the un-named people he did threaten were aware of the threat

[5] Because Mr. Henderson was also charged with two other counts of harassment stemming from the events of the same evening, the state likely elected to limit count II to threats against Boyd to avoid issues with double jeopardy and jury unanimity.

or placed in reasonable fear. *Kiehl*, 128 Wn. App. at 93; *Fansworth*, 184 Wn. App. 305. Mr. Henderson's conviction in count II must be reversed. *Id.*

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT MR. HENDERSON WAS "ARMED" WITH A FIREARM DURING THE COMMISSION OF THE DRUG POSSESSION OFFENSES.

The state alleged that Mr. Henderson was armed with a firearm during the commission of the drug possession offenses. The allegation was based on a gun was found under the mattress in the room attached to the closet containing the drugs. There was no evidence that Mr. Henderson was ever near the gun and the drugs at the same time. The state did not prove that he was armed when he possessed the drugs.

Constructive possession of a gun is insufficient to demonstrate that the accused was "armed" to justify a firearm enhancement. *State v. Brown*, 162 Wn. 2d 422, 431, 173 P.3d 245 (2007); *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Mere proximity of the gun to the accused is, likewise, insufficient. *Brown*, 162 Wn.2d at 431.

Here, the state's evidence demonstrated, at best, that Mr. Henderson had constructive possession of the gun. That evidence is categorically insufficient to prove that he was armed during the commission of the other offenses. *Brown*, 162 Wn.2d at 431; . *Gurske*, 155 Wn.2d at 138.

A person is only armed with a deadly weapon during the commission of a crime if it is "easily accessible and readily available for either offensive or defensive purposes." *Brown*, 162 Wn.2d at 431.[6] There must be a nexus between the accused and the gun and also between the gun and the crime. *Id.* The nexus requirement places particular parameters on the definition of "armed" in cases involving continuing offenses such as constructive possession of drugs. *Gurske*, 155 Wn.2d at 140-41.

There is no nexus between the accused and gun if the gun is not "easily accessible and readily available" at some time when "use for offensive or defensive purposes [is] important." *Gurske*, 155 Wn.2d at 141-42.

The state's evidence of constructive possession was insufficient to demonstrate a nexus between Mr. Henderson and the gun. No evidence showed that the gun was accessible and available at any time when Mr. Henderson would have had to use it for offensive or defensive purposes. *Id.* As the *Gurske* court noted, this limitation is particularly important in cases involving constructive drug possession. *Id.* Simply having a gun

[6] Whether a person is armed is a mixed question of law and fact, reviewed *de novo*. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002).

and drugs on the same premises is insufficient to prove that a person was armed during the commission of a specific offense. *Id.*

There must also be a nexus between the weapon and the crime. *Gurske*, 155 Wn.2d at 142. "Mere presence of a weapon at the crime scene may be insufficient." *Id.*

In *Gurske*, the accused was caught with drugs in the driver's seat of a car. He had a gun in a backpack on the floor behind him. *Id.* at 143. This evidence was insufficient to establish a nexus between the gun and the offense because he would have had to get out of the car or move to the passenger seat to access the gun. *Id.* There was no evidence that Gurske had easy access to the gun at any other relevant time, such as when he acquired the drugs. *Id.*

Here, there was far less evidence linking the gun and the alleged drug possession. Unlike in *Gurske*, the police did not find Mr. Henderson, the drugs, and the gun all in the same place. There was no evidence that Mr. Henderson was ever close to the gun while the drugs were in his constructive possession. The state failed to prove a nexus between the gun and the drugs. *Gurske*, 155 Wn.2d at 142.

The state presented insufficient evidence to prove that Mr. Henderson was armed during the commission of his drug possession offenses. *Brown*, 162 Wn. 2d at 431; *Gurske*, 155 Wn. 2d at 138. The

firearm enhancements must be vacated and the case remanded for resentencing. *Id.*

III. PROSECUTORIAL MISCONDUCT DEPRIVED MR. HENDERSON OF A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed misconduct by telling the jury repeatedly that control over premises is sufficient to prove constructive possession of contraband within.

The prosecutor argued to the jury that it could find that Mr. Henderson had constructively possessed the drugs and gun if it found that he had control over the bedroom in which they were found. RP (11/6/14)

467-468. Indeed, the prosecutor claimed that simply being in proximity with the contraband was enough to prove possession:

> The defendant had been in the apartment on March 12, in the structure where the gun was, where the drugs were. He was in constructive possession…
> RP (11/6/14) 467.

But a jury finding that the bedroom was under Mr. Henderson's control was not sufficient to prove constructive possession of the gun under the mattress and the drugs in the jacket pocket in the closet. The prosecutor committed misconduct by misstating the law on a critical issue in Mr. Henderson's case.

Dominion and control over premises containing contraband is insufficient, by itself, to prove constructive possession. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014)[7]; *See also State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Rather, control over the premises is only one factor in determining whether a person has constructively possessed items found therein. *Tadeo-Mares*, 86 Wn. App. at 816.

A prosecutor commits misconduct by mischaracterizing the law to the jury. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

[7] *Davis* was a plurality opinion. The majority's decision regarding the constructive possession issue was announced in Justice Stephens's dissent, which is cited here.

Here, the prosecutor misstated the law by telling the jury that evidence that Mr. Hernandez had control over the apartment and bedroom was enough to find him guilty of his drug and gun charges. *Id.* The prosecutor committed misconduct by mischaracterizing the law for the jury. *Id.*; *Tadeo-Mares*, 86 Wn. App. at 816.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Here, Mr. Henderson was prejudiced by the prosecutor's improper arguments. *Id.* Numerous other people appeared to live in the apartment. RP (11/4/14) 237. Someone else's driver's license was lying on the bed in the room where the contraband was found. RP (11/4/14) 242-244. The police did not find any mail, bills, or other documents listing both Mr. Henderson's name and the address of the residence. There was nothing linking the jacket in which the drugs were found to Mr. Henderson. The evidence of constructive possession was far from overwhelming.

There was, however, some evidence that Mr. Henderson may have had dominion and control over the bedroom. The prosecutor chose to deal with the state's evidentiary shortcomings by telling the jury that this minimal evidence was also sufficient to prove constructive possession of

the contraband, not merely dominion and control over the bedroom. The prosecutor mischaracterized the law rather than arguing that the state's evidence supported conviction. There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Henderson's case. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing caselaw prohibiting him from mischaracterizing the law in closing argument. *See e.g. Evans*, 163 Wn. App. at 643. Likewise, the rule that control over premises is insufficient, standing alone, to prove constructive possession was well-established. *See e.g. Davis*, 182 Wn.2d at 234; *Tadeo-Mares*, 86 Wn. App. at 816. The prosecutor's improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law during closing argument. *Evans*,

163 Wn. App. at 643. Mr. Hernandez's drug and gun possession convictions must be reversed. *Id.*

C. The prosecutor committed misconduct by repeatedly shifting the burden of proof onto Mr. Henderson during closing argument.

In closing, the prosecutor argued that Mr. Henderson had failed to call the other involved police officers or the occupants of the apartment as witnesses. RP (4/6/11) 496-97. The court sustained Mr. Henderson's objection to this burden-shifting argument. RP (4/6/11) 496.

Still, the prosecutor's next statement was that Mr. Henderson could have called his girlfriend as a witness. RP (4/6/11) 496. Mr. Henderson's objection was sustained again. RP (4/6/11) 496-497. Both times, the court failed to strike the arguments or to admonish the jury not to consider them. RP (4/6/11) 497.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Glasmann*, 175 Wn.2d at 713 (*citing In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Walker,* 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's

burden and undermines a defendant's due process rights." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson I). Because the accused has no duty to present evidence, a prosecutor generally cannot comment on the lack of defense evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).

Here, Mr. Henderson made valid arguments in his closing. He pointed out that the state had not called all of the witnesses it could have. RP (11/ 6/14) 484-485, 487. In response, the prosecutor should have argued that the state's evidence was sufficient to convict even absent those witnesses. But the prosecutor did not make that argument.

Instead, the prosecutor shifted the burden onto Mr. Henderson by pointing out that he had not presented any evidence, had not called the additional police witnesses or the other people in the residence, and had not called his girlfriend to testify.[8] RP (4/6/11) 496-497. The prosecutor's argument was improper. *Thorgerson*, 172 Wn.2d at 467.

[8] It is misconduct for a prosecutor to point out an accused person's failure to call a witness unless the missing witness rule applies. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009). The missing witness doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the party against whom the instruction is offered, (3) the witness's absence is not satisfactorily explained, and (4) the argument does not shift the burden of proof. *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008). The state must also raise the argument "early enough in the proceedings to provide an opportunity for rebuttal or explanation." *Id.* at 599. These limitations are "particularly important" when the missing witness doctrine is applied against an accused person. *Id.* at 598.

There is a substantial likelihood that the prosecutor's improper burden-shifting arguments affected the outcome of Mr. Henderson's trial. *Glasmann*, 175 Wn.2d at 707. The evidence showed that several other people were in the home when the search revealed the gun and drugs. RP (11/4/14) 237. None of those people were called as witnesses. The prosecutor's argument made it appear as though that failure of proof could be held against Mr. Henderson rather than against the state.

The court properly sustained Mr. Henderson's objections but never struck the prosecutor's improper arguments from the record. RP (4/6/11) 496-497. The judge also never admonished the jury to disregard the comments. RP (4/6/11) 496-497. Mr. Henderson was prejudiced by the prosecutorial misconduct. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed prejudicial misconduct by shifting the burden of proof onto Mr. Henderson during closing. *Walker*, 164 Wn. App. at 732. Mr. Henderson's convictions must be reversed. *Id.*

The missing witness rule only applies when "it is clear the defendant was able to produce the witness." *Dixon*, 150 Wn. App. at 55. The testimony of the accused must also "unequivocally impl[y] the uncalled witness's ability to corroborate his theory of the case." *Id.*

Here, the police officers were certainly more readily available to the state than to Mr. Henderson. The state did not present any evidence that the other people in the apartment were "particularly under the control" of Mr. Henderson and the argument also shifted the burden of proof onto Mr. Henderson. The state did not raise the missing witness argument early enough for Mr. Henderson to explain the witness's absence. Finally, Mr. Henderson did not testify and did not "unequivocally imply" that the missing witnesses would have supported the defense theory. The prosecutor's argument was not

D. The prosecutor committed misconduct by telling the jury that they were convinced beyond a reasonable doubt if they felt Mr. Henderson was guilty in their "heart of hearts."

During closing argument, the prosecutor told the jury that the state's burden had been met "If you believe in your heart of hearts that, yes, these elements have been proven." RP (11/6/14) 490. The prosecutor committed misconduct by minimizing and misstating the state's burden of proof.

A prosecutor commits misconduct by minimizing the state's burden of proof to the jury. *Johnson*, 158 Wn. App. at 685-86.

Here, the prosecutor committed misconduct by mischaracterizing the state's burden to the jury. *Id.* Belief of guilt in one's "heart of hearts" is not the same as being convinced beyond a reasonable doubt. Indeed, a juror could believe in his/her heart that Mr. Henderson was guilty while still harboring a reasonable doubt based on the evidence or lack of evidence. The prosecutor's argument was improper. *Id.*

There is a substantial likelihood that the prosecutor's mischaracterization of the state's burden affected the outcome of Mr. Henderson's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence of constructive possession, of at least one harassment charge, and that Mr. Henderson was armed was not extensive. But the police

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permissible under the missing witness doctrine. *Montgomery*, 163 Wn.2d at 598-99;

witnesses described Mr. Henderson in a very unflattering light: he allegedly boasted about selling drugs and said that he should have shot the officers when they came to his door. RP (4/14/11) 225-228. A reasonable juror could believe in his/her "heart of hearts" that Mr. Henderson was guilty based on his general demeanor without actually being convinced of each of the elements beyond a reasonable doubt. Mr. Henderson was prejudiced by the state's improper argument. *Id.*

Again, the prosecutor had access to established precedent prohibiting the kind of argument made in this case. *See e.g. Johnson*, 158 Wn. App. at 677, 685-86. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing the state's burden of proof in closing. *Johnson*, 158 Wn. App. at 677, 685-86. Mr. Henderson's convictions must be reversed. *Id.*

Dixon, 150 Wn. App. at 55.

IV. THE COURT VIOLATED MR. HENDERSON'S RIGHT TO COUNSEL BY ALLOWING HIM TO PROCEED *PRO SE* WITHOUT INQUIRING INTO THE BREAKDOWN OF THE ATTORNEY-CLIENT RELATIONSHIP AND BY APPOINTING THE SAME ATTORNEY AS STANDBY COUNSEL.

1. The court should have inquired into the conflict between Mr. Henderson and his attorney before allowing him to proceed *pro se.*

Mr. Henderson twice informed the court that his relationship with counsel had completely broken down: once before he was permitted to represent himself and once when the same attorney was appointed as his standby counsel. CP 1-2, 9. At the beginning of trial, Mr. Henderson noted that he had been forced to proceed *pro se* due to the conflict with his attorney. RP (11/3/14) 14-15.

The court never conducted any inquiry into Mr. Henderson's problems with his lawyer. The court never asked him about the basis for his concerns or determined whether they were valid. Instead, the judge simply permitted him to act as his own lawyer, and appointed the same attorney as his standby counsel. The court violated Mr. Henderson's right to counsel by failing to conduct any analysis into his the breakdown of communication between attorney and client.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *State v. Cross*, 156 Wn. 2d 580, 607, 132 P.3d 80 (2006), *as corrected* (Apr. 13, 2006).

When an accused person alleges that his/her relationship with counsel has broken down, the trial court must inquire into the underlying issues. *Cross,* 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross,* 156 Wn.2d at 610.

The court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.' …The inquiry must also provide a 'sufficient basis for reaching an informed decision.'" *United States v. Adelzo-Gonzalez,* 268 F.3d 772 (9th Cir. 2001). Furthermore, "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Adelzo-Gonzalez,* 268 F.3d at 776-777. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez,* 268 F.3d at 776-777.

An accused person is denied his right to counsel when he elects to proceed *pro se* after the court fails to address his concerns with appointed counsel. *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979).

Here, Mr. Henderson wrote a letter to the court from jail, telling the judge that his relationship with his attorney had completely broken

down. CP 1-2. He told the judge that counsel had walked out of their last meeting and had not shown up to meet with him again. CP 1-2. He asked to have new counsel appointed. CP 2. The judge never responded.

At the next hearing, Mr. Henderson asked to represent himself. RP (10/6/14) 2. Again, the court did not conduct any inquiry into the issues between Mr. Henderson and his attorney. During the colloquy, Mr. Henderson told the court that he had chosen to proceed *pro se* because his attorney was not adequately representing him and had said things that were not true. RP (10/6/14) 8-9, 11, 15. The court did not ask about his concerns.

The trial court should have appointed new counsel. Failing that, the court should have asked specific and targeted questions, encouraging Mr. Henderson to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The court violated Mr. Henderson's right to counsel by permitting him to represent himself without first inquiring into the breakdown of his relationship with his appointed attorney. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779; *Williams*, 594 F.2d at 1260.

E. The court should not have appointed the same person as standby counsel without inquiring into the conflict between attorney and client.

A court's duty to inquire into a breakdown between the accused and counsel applies to standby counsel for a *pro se* defendant. *See State v. McDonald*, 143 Wn.2d 506, 513, 22 P.3d 791 (2001). The court failed to do so here.

After he was granted *pro se* status, Mr. Henderson's original attorney was appointed as his standby counsel. CP 9. Mr. Henderson wrote to the court again, pointing out anew that his relationship with this attorney had broken down. CP 9. Once again, the court failed to conduct any inquiry into the problem.

Like the court's original failure to inquire, this failure also violated Mr. Henderson's right to counsel. *Id.*

The court violated Mr. Henderson's right to counsel by failing to inquire into the alleged breakdown of communication with his attorney. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The court repeated the mistake when it failed to inquire into the same issues when the same attorney was appointed as Mr. Henderson's standby counsel after he proceeded *pro se*. *McDonald*, 143 Wn.2d at 513. Mr. Henderson's convictions must be reversed. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779; *McDonald*, 143 Wn.2d at 513.

V. RCW 69.50.4013 IS UNCONSTITUTIONAL WHEN APPLIED TO CASES INVOLVING SIMPLE POSSESSION OF MERE RESIDUE.

One of Mr. Henderson's drug possession convictions was for possession of an amount of residue so small that the officers who seized the evidence did not even know it was there. RP (11/4/14) 248-249; Ex. 8. Still, the state was not required to prove that Mr. Henderson actually knew the residue was there. The jury was permitted to convict him of felony possession based on the mere fact that the residue existed and was, supposedly, in his possession.

This unduly harsh result is not permitted in the majority of jurisdictions. Washington's statute making it a felony to possess mere drug residue even without a culpable mental state violates the Eighth Amendment and Due Process.

1. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions on possession of drug residue without proof of a culpable mental state.

1. The Eighth Amendment prohibits punishment conflicting with the evolving standards of decency that mark the progress of a maturing society.

The Eighth Amendment categorically prohibits certain punishments. *Graham v. Florida*, 560 U.S. 48, 59-61, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010). Traditionally, this approach applied only in

death penalty cases. *Id.,* at 60. The Supreme Court has expanded the categorical approach to cases that do not involve the death penalty. *Id.,* at 61.

To implement the Eighth Amendment, courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Graham,* 560 U.S. at 58. The *Graham* court adopted a two-step framework for the categorical approach.

First, a reviewing court considers objective indicia of society's standards—in the form of legislation and sentencing data— "to determine whether there is a national consensus against the sentencing practice." *Id.,* at 61. Second, the court considers "'standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose' …[to] determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.,* (quoting *Kennedy v. Louisiana,* 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525, *opinion modified on denial of reh'g,* 129 S.Ct. 1 (2008)).

In *Graham,* the court analyzed sentencing data and found it significant that "only 11 jurisdictions nationwide" imposed the challenged sentence (in that case, life without parole for juvenile nonhomicide offenders). *Id.,* at 64. The court characterized the practice as "exceedingly rare." *Id.,* at 67.

The reasoning set forth in *Graham* requires invalidation of RCW 69.50.4013 as applied to possession of drug residue, when that crime is committed without any culpable mental state.

2. There is a strong national consensus that possession of drug residue should not be punished as a felony absent proof of some culpable mental state.

The consequences of a felony conviction are much greater than those imposed for a gross misdemeanor. A class C felony may be punished by up to five years in prison and a fine of up to $10,000.[9] RCW 9A.20.021. Furthermore, a convicted felon loses certain civil rights, such as the the right to vote, to sit on a jury, and to possess a gun, in addition to suffering "grave damage to his [or her] reputation." *United States v. Wulff,* 758 F.2d 1121, 1125 (6th Cir. 1985).

There is a clear national consensus that mere possession of drug residue should not be punished as a felony absent a *mens rea* element. *See, e.g., Costes v. Arkansas,* 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.,* 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba,* 859 P.2d 708 (1993) ("Usable-quantity rule" requires proof

[9] This compares to a fine of $5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

that substance is in form and quantity that can be used); *Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant "knowingly or intentionally" possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant's knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of "awareness" and "conscious intent to possess"); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant's knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant's statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a "miniscule" amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant

"knowingly or purposely" obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting "usable quantity" rule, but noting that prosecution must prove knowledge); *Lord v. State*, 616 So.2d 1065 (Fla. Dist. Ct. App. 1993) (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction);*Garner v. Texas*, 848 S.W.2d 799, 801 (1993) ("When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance"); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a "measurable amount" of controlled substance, so long as knowledge is established); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony); N.D. Cent. Code Ann. § 19-03.1-23; N.D. Cent. Code. § 12.1-02-02; *State v. Christian*, 2011 ND 56, 795 N.W.2d 702, 705 (2011) (willful possession—including reckless possession—of residue is a felony).

This national consensus is considerably stronger than in *Graham.* Thus, the analysis moves to the second phase. *Graham*, 560 U.S. at 61. The court examines three factors in applying the second part of the *Graham* test: (1) "the culpability of the offenders at issue in light of their crimes and

characteristics," (2) "the severity of the punishment," and "(3) whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67 (citations omitted).

These three factors support the national consensus outlined above. First, persons who unknowingly possess drug residue are relatively blameless. Second, a felony conviction, the associated punishments, and the additional consequences to reputation and civil rights are unduly harsh. Third, there are no legitimate penological goals for imposing felony liability on those who unknowingly possess drug residue.

Four commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 72. None of these four goals are served here.[10] A person who unwittingly possesses drug residue cannot be deterred from doing so in the future. If the statute's goal is to make people more careful, even a low-level mental state such as criminal negligence would serve that purpose; it is unnecessary to punish those whose mental state is wholly innocent.

Nor does it make sense to speak of retribution or incapacitation for a person who unwittingly possessed drug residue. Where possession is

[10]Furthermore, any penological goals are adequately served by RCW 69.50.412(1), which criminalizes (*inter alia*) the use of drug paraphernalia to store or ingest a controlled substance. Indeed, most residue cases—including this one—could be prosecuted under RCW 69.50.412(1). Violation of the statute is a misdemeanor.

unwitting, the "offender" is neither deserving of punishment nor prevented (by imposition of felony sanctions) from causing future harm.

Finally, a person who possessed drug residue without knowledge cannot be rehabilitated. Rehabilitation presupposes a volitional act that can be treated in some manner. A person who did not even act negligently with respect to the fact of possession (or the nature of the substance) will not respond to any form of treatment, because there is no ill to be addressed.

Under *Graham,* "the sentencing practice under consideration is cruel and unusual." *Id.,* at 74. The Eighth Amendment categorically prohibits punishing as a felony the possession of drug residue, without some proof of a culpable mental state. *Id.*

F. RCW 69.50.4013 violates due process as applied to possession of drug residue absent proof of some culpable mental state.

The Fourteenth Amendment guarantees an accused person due process of law. U.S. Const. Amend. XIV. The legislature may create crimes with no *mens rea;* however, due process "admits only a narrow category of strict liability crimes, generally limited to regulatory measures where penalties are relatively small." *United States v. Macias,* 740 F.3d 96, 105 (2d Cir. 2014) (Raggi, J., concurring). There are constitutional limits on the kind of penalties that can be imposed for strict liability crimes: "[s]evere fines and jail time…

warrant a state of mind requirement" for conviction. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n. 4 (10th Cir. 2010).[11]

A statute imposing strict liability "does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125. If it were otherwise, "a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his [or her] reputation," a result that "the Constitution does not allow." *Id.; see also Louisiana v. Brown*, 389 So.2d 48, 51 (La. 1980) (invalidating as unconstitutional "the portion of the statute making it illegal "unknowingly" to possess a Schedule IV substance).

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are "not inconsistent with the Constitution and statutes of this state…" RCW 9A.04.060. Washington courts have the power to recognize non-statutory elements of an offense.[12] *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is an essential nonstatutory element of robbery);

[11] This is in keeping with the Supreme Court's prohibition on statutes that criminalize status crimes and acts which the defendant does not cause. *Apollo*, 611 F3d at 678 (citing *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) and *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

[12] In fact, the judiciary even has the power to define entire crimes. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to recognize affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v.*

State v. Goodman, 150 Wn.2d 774, 786, 83 P.3d 410 (2004) (identity of controlled substance is an essential element when it affects the penalty); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992) (JohnsonII) (Conspiracy to deliver includes common-law element of "involvement of a third person outside the agreement.") Courts also have the power to add other facts required for conviction, when such facts are necessary to ensure the constitutionality of the statute. *See, e.g., State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013), *as amended* (Feb. 8, 2013) (First Amendment requires state to prove a "true threat" for harassment conviction, but "true threat" is not an element of the offense.)

Possession of a controlled substance is a strict liability offense. *State v. Denny*, No. 42447-9-III, 294 P.3d 862 (Feb. 20, 2013). Current law allows conviction for unwitting possession of amounts so small as to be imperceptible to the naked eye. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) ("[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction."). Because of this, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who visits Washington from Florida would likely be guilty of cocaine possession

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Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

upon arrival.[13] *See, e.g., Lord,* 616 So.2d at 1066 ("It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.")

Washington's possession law violates due process. *Macias,* 740 F.3d 96. RCW 69.50.4013 imposes liability even when the accused cannot know she or he is in possession of a controlled substance without the aid of sensitive equipment.

The court should either invalidate the statute or employ its inherent and statutory authority to recognize a *mens rea* element for possession of a controlled substance.[14] *Goodman,* 150 Wn.2d 774*; Cleppe*, 96 Wn.2d 373*; Chavez,* 163 Wn.2d 262. A common law element requiring proof of a culpable mental state is not inconsistent with Washington's possession statute. RCW 69.50.4013.

The obligation to recognize a *mens rea* element does not conflict with *Cleppe* and its progeny. *Cleppe* concerned an issue of statutory interpretation; it did not address the requirements of the due process clause. *Cleppe,* 96 Wn.2d at 377-381. Furthermore, *Cleppe* and subsequent cases have been

[13]Such a person might assert the affirmative defense of unwitting possession. *Cleppe*, 96 Wn.2d at 381.

[14] The Supreme Court has rejected a "usable quantity" test, but has never upheld a conviction based on possession of mere residue. *See State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on "a measurable amount" of Demerol.)

concerned only with proof of intent or guilty knowledge. *Id.* There do not appear to be any cases addressing lesser mental states such as negligence or recklessness.

If the court recognizes a non-statutory element requiring proof of some culpable mental state, Mr. Henderson's conviction for possession of heroin residue would be based on insufficient evidence, in violation of his right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should either recognize such an element or invalidate RCW 69.50.4013 as applied. In either case, the court must reverse Mr. Henderson's conviction and dismiss the charge with prejudice. *Id.*

VI. THE TRIAL COURT ERRED BY ORDERING MR. HENDERSON TO PAY $1,400 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY AND DESPITE HIS ACQUITTAL ON TWO FELONY CHARGES.

Mr. Henderson was found indigent at the end of trial. CP 123-125. Still, the court ordered him to pay $1,400 in legal financial obligations (LFOs). CP 105.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 104. But the court did not conduct any particularized inquiry into Mr. Henderson's financial situation at sentencing or at any other time.

RP (11/14/14) 3-20. The court erred by ordering Mr. Henderson to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Henderson's ability to pay LFOs. RP (11/14/14) 3-20. The court did not consider his financial status in any way. Indeed, the court also found Mr. Henderson indigent four days after it imposed $1,400 in LFOs. CP 123-125.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Henderson's lengthy incarceration would have weighted heavily against a finding that he had the ability to pay LFOs.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Additionally, LFOs may only be imposed upon a convicted offender. RCW 9.94A.760(1). Mr. Henderson was acquitted of two of his felony charges.

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, --- Wn.2d ---, 344 P.3d at 683. The *Blazina* court recently chose to review the exact LFO-related issue raised in Mr. Gaines's case, finding that "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court's lead and consider the merits of Mr. Gaines's LFO claim even though it was not raised below.

The court erred by ordering Mr. Henderson to pay $1,400 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn2d at --

-, 344 P.3d at 685. Furthermore, the imposition of LFOs is inappropriate, given that Mr. Henderson prevailed on two felony charges at trial.

The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

The state presented insufficient evidence to convict Mr. Henderson of felony harassment in count II. The state also presented insufficient evidence that Mr. Henderson was "armed" during the commission of the drug possession offenses. Both the harassment charge and the firearm enhancements must be vacated and dismissed with prejudice.

The prosecutor committed misconduct by misstating the law and mischaracterizing the state's burden of proof in closing argument. The court violated Mr. Henderson's right to counsel by failing to conduct any inquiry into the breakdown of communication with his attorney both before and after permitting him to proceed *pro se*. All of Mr. Henderson's convictions must be reversed, and the case remanded for a new trial.

Washington's statute permitting felony conviction for possession of mere drug residue even absent a culpable mental state violates the Eighth Amendment and due process because it produces an unduly harsh

result rejected by most jurisdictions. Mr. Henderson's conviction for possession of residue must be reversed and the charge dismissed.

The court erred by ordering Mr. Henderson to pay $1,400 in legal financial obligations without conducting any inquiry into his ability to do so. If Mr. Henderson's convictions are not reversed, the case must be remanded for a hearing on the issue of whether Mr. Henderson has the means to pay LFOs, and whether the imposition of LFOs is appropriate given that he prevailed on two felony counts.

Respectfully submitted on April 30, 2015,

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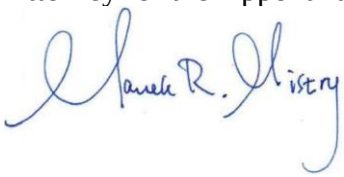

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Akeem Henderson, DOC# 854980
Coyote Ridge Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 30, 2015.

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